CHLORIDE EASTERN INDUSTRIES PTE LTD *a*

v.

PREMIUM VEGETABLES OILS SDN BHD

COURT OF APPEAL, KUALA LUMPUR *b*
NH CHAN JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: J-02-586-95]
27 NOVEMBER 2001 *c*

COMPANY LAW: *Dividends - Claim for dividend for financial year 1991 - Whether shareholder entitled to dividend as shares only allotted in 1992 - Whether intention of parties that shares be allotted as soon as subscription money received - Whether subscription money received before end of financial year 1991*

COMPANY LAW: *Dividends - Shareholder's claim for dividend despite losses - Whether payment made would contravene s. 365 Companies Act 1965 - Whether claim only in relation to shareholder's entitlement to dividend and not for payment to be made out - Whether shareholder sought for other rights following from non-payment of dividend - Articles of Association, art. 4B* *d*

COMPANY LAW: *Members' rights - Oppression - Shareholder of preference shares - Right to compensation, voting rights and right to nominate representative on Board of Directors upon non-payment of dividend - Whether denied by company - Articles of Association, art. 4B - Companies Act 1965, s. 218(f)* *e*

COMPANY LAW: *Shares - Preference shares - Redemption - Whether redemption should be at full aggregate value subscribed including premium - Whether redemption at lesser value contravened ss. 60 and 61 Companies Act 1965* *f*

The petitioner on the invitation of the directors of the respondent subscribed to 2,500,000 non-cumulative preference shares of the respondent ('the shares'). The offer came pursuant to a circular resolution dated 10 December 1991. Subsequently, the petitioner applied to the court below, *inter alia*, that the respondent redeem the shares from the petitioner with no loss of value at RM2.5 million. However, that application was dismissed. Hence, the petitioner's appeal. *g*

The petitioner claimed that the non-recognition by the respondent of its rights to the dividend for the financial year 1991 deprived it of its other rights under art. 4B of the Memorandum and Articles of Association of the respondent ('AA'). According to the said article, the non-payment of dividend would entitle the petitioner for compensation, voting rights and the right to nominate its representative on the Board of Directors of the respondent. Against that, the respondent submitted that the petitioner had no right to any dividend for the *h* *i*

financial year 1991 because the shares were only allotted to the petitioner in May 1992. It followed, therefore, that the petitioner was also not entitled to the other rights under art. 4B of the AA. Further, the respondent suffered losses for the financial year 1991 and therefore no dividend could be declared for that financial year. To do so would contravene s. 365 of the Companies Act 1965 ('CA').

Held:

Per Mokhtar Sidin JCA

[1] The wordings that "dividends be paid on pro-rata basis from the date the subscription money was received" in the circular resolution showed that it was the intention of the parties that the shares be allotted to the petitioner as soon as the subscription money was received by the respondent and it was not disputed by the respondent that it had received the subscription money before 31 December 1991. Further, as the petitioner was buying all the preference shares, there should be no question of allotment at all. It followed therefore that the petitioner was entitled to the dividend in the financial year 1991. (p 381 e-h)

[2] There was no contravention of s. 365 of the CA as the petitioner did not demand for the payment of the dividend to be made out but only that it be entitled to it. Non-declaration or non-payment of the dividend for any financial year would confer certain rights to the petitioner, such as, compensation, voting rights and the right to nominate its representative on the Board of Directors of the respondent pursuant to art. 4B of the AA. (p 383 c-d)

[3] The parties did not come to a mutual agreement in respect of compensation when the dividend for the financial year 1991 was not declared. There was no negotiation by the respondent because it took the stand that the petitioner was not entitled to the dividend for that year. The petitioner was also not given its voting right. Instead, the respondent passed a resolution to redeem the shares from the petitioner at the value determined by its Board of Directors. Further, the respondent refused to allow the petitioner to nominate its representative on the Board of Directors on the ground that the petitioner was not entitled to any dividend for the financial year 1991 until the commencement of this proceeding. In refusing to do so, the existing directors of the respondent intended to dominate the Board of Directors to the total exclusion of others including the petitioner. In view of the above, it was clear that the respondent had been oppressive of the petitioner. (pp 383 h & 386 c, g-i)

[4] The respondent did not intend to confer any right or status to the petitioner when it invited the petitioner to subscribe to the shares. The purpose of the invitation was nothing more than to bail itself out at the time of difficulties. (p 388 g)

[5] Any redemption to be done must be in accordance with art. 4B of the AA unless amended. Article 4B stated that the redemption should be the full aggregate value subscribed (including premium paid) in two equal instalments in the fourth and fifth year after the subscription. Sections 60 and 61 of the CA prohibits the redemption of preference shares at lesser value than the aggregate amount subscribed. The said provisions of the CA could not be modified by resolutions passed. In the present case, the aggregate amount subscribed in s. 61 of the CA for the preference shares and the premium paid herein was RM1 per share. The offer by the respondent to redeem them at RM0.10 per share was contrary to s. 61. (pp 389 g-i & 390 a-b)

[6] The petitioner had made a case under s. 218(f) of the CA, *ie*, that the directors of the respondent had been unfair and unjust to the petitioner which entitled the respondent to be wound up. However, winding-up was not in the interest of the parties. From the statement of claim and the reliefs sought, the petitioner was more interested in getting its money back for the shares it had paid. As the main relief sought by the petitioner was for the respondent to redeem the shares at RM1 per share (including premium), the other reliefs stated in the alternatives would not arise because by the redemption the petitioner was deemed to have disposed of all its shares in the respondent. As such, the petitioner's interests and rights with the respondent ceased. (p 390 b-e)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Pempetisyen atas pelawaan pengarah-pengarah responden telah melanggan 2,500,000 saham-saham keutamaan tak terkumpul responden ('saham-saham tersebut').Tawaran tersebut adalah selaras dengan satu pekeliling resolusi bertarikh 10 Disember 1991. Berikutan itu, pempetisyen telah memohon kepada mahkamah di bawah, antara lainnya, bahawa responden menebus saham-saham daripada pempetisyen tanpa kerugian nilai pada RM2.5 juta. Walaubagaimanapun permohonan itu telah ditolak. Dengan yang demikian, menyebabkan rayuan pempetisyen.

Pempetisyen menuntut bahawa ketiadaan pengiktirafan oleh responden akan haknya kepada dividen untuk tahun kewangan 1991 telah melucutnya dari haknya yang lain di bawah per. 4B Memorandum dan Artikel Persatuan responden ('AA'). Berhubung dengan artikel tersebut, ketiadaan bayaran dividen akan memberi hak kepada pempetisyen untuk mendapatkan pampasan, hak mengundi dan hak untuk menamakan wakilnya pada Lembaga Pengarah responden. Bertentang dengan itu, responden berhujah bahawa pempetisyen tidak berhak kepada sebarang dividen untuk tahun kewangan 1991 kerana saham-saham tersebut hanya terumpuk kepada pempetisyen dalam bulan Mei

1992. Diikuti, dengan itu, bahawa pempetisyen juga tidak berhak kepada hak lain di bawah per. 4B AA. Seterusnya, responden telah mengalami kerugian bagi tahun kewangan 1991 dan dengan itu tiada dividen boleh diisytiharkan untuk tahun kewangan itu. Perbuatan yang sedemikian akan melanggari s. 365 Akta Syarikat 1965 ('CA').

Diputuskan:

[1] Perkataan-perkataan bahawa "dividends be paid on pro-rata basis from the date the subscription money was received" (dividen hendaklah dibayar atas dasar pro-rata daripada tarikh wang langganan diterima) dalam pekeliling resolusi menunjukkan bahawa ianya merupakan niat pihak-pihak tersebut bahawa saham-saham hendaklah diumpukkan kepada pempetisyen sebaik sahaja wang langganan diterima oleh responden dan ianya tidak dipertikaikan oleh responden bahawa ianya telah menerima wang langganan sebelum 31 December 1991. Selanjutnya, oleh kerana pempetisyen membeli kesemua saham-saham keutamaan, tidak seharusnya timbul sebarang persoalan perumpukan sama sekali. Diikuti dengan itu bahawa pempetisyen berhak kepada dividen dalam tahun kewangan 1991.

[2] Tiada perlanggaran akan s. 365 CA kerana pempetisyen tidak menuntut pembayaran dividen dibuat tetapi hanya bahawa ianya berhak kepadanya. Ketiadaan pengisytiharan atau ketiadaan pembayaran untuk sebarang tahun kewangan akan hanya memberikan hak tertentu kepada pempetisyen, seperti, pampasan, hak mengundi dan hak untuk menamakan wakilnya pada Lembaga Pengarah responden selaras dengan per. 4B AA tersebut.

[3] Pihak-pihak tersebut tidak mencapai persetujuan bersama berhubung dengan pampasan apabila dividen bagi tahun kewangan 1991 tidak diisytiharkan. Tidak terdapat sebarang perundingan oleh responden kerana ianya berpendirian bahawa pempetisyen tidak berhak kepada dividen bagi tahun itu. Pempetisyen juga telah tidak diberikan hak mengundinya. Sebaliknya, responden telah meluluskan satu resolusi untuk menebus saham-saham tersebut daripada pempetisyen pada nilai yang ditentukan oleh Lembaga Pengarahnya. Selanjutnya, responden enggan membenarkan pempetisyen untuk menamakan wakilnya pada Lembaga Pengarahnya atas alasan bahawa pempetisyen tidak berhak kepada sebarang dividen untuk tahun kewangan 1991 sehingga permulaan prosiding ini. Dalam enggan untuk melakukan yang sedemikian, pengarah-pengarah responden berniat untuk mempengaruhi Lembaga Pengarah dengan mengecualikan pihak-pihak lain termasuk pempetisyen. Memandangkan perkara yang tersebut di atas, ianya jelas bahawa responden telah menindas pempetisyen.

[4] Responden tidak berniat untuk memberikan sebarang hak atau status kepada pempetisyen ketika ianya menjemput pempetisyen untuk melanggan kepada saham-saham tersebut. Tujuan jemputan tersebut adalah tidak lebih daripada menjamin dirinya keluar daripada masa-masa kesusahan.

[5] Sebarang penebusan yang hendak dilakukan mestilah menurut per. 4B AA tersebut kecuali dipinda. Artikel 4B menyatakan bahawa penebusan seharusnya merupakan nilai agregat sepenuhnya yang dilanggan (termasuk premium yang dibayar) dalam dua ansuran yang sama pada tahun keempat dan kelima selepas langganan tersebut. Seksyen-seksyen 60 dan 61 CA melarang penebusan saham-saham keutamaan pada nilai yang kurang dari jumlah agregat yang dilanggan. Peruntukan CA tersebut tidak boleh diubahsuai melalui resolusi yang diluluskan. Dalam kes semasa, jumlah agregat yang dilanggan dalam s. 61 CA untuk saham-saham keutamaan dan premium yang dibayar adalah RM1 sesaham. Tawaran oleh responden untuk menebusnya pada RM0.10 sesaham adalah bertentangan dengan s. 61.

[6] Pempetisyen telah membuat satu kes di bawah s. 218(f) CA, iaitu, bahawa pengarah-pengarah responden telah bertindak tidak adil dan tidak saksama kepada pempetisyen di mana responden berhak digulung. Walaubagaimanapun, penggulungan tidak menjadi kepentingan pihak-pihak tersebut. Daripada pernyataan tuntutan dan relief yang dipohon, pempetisyen lebih berminat untuk mendapatkan wangnya kembali untuk saham-saham yang telah dibayar. Oleh kerana relief utama yang dipohon oleh pempetisyen adalah untuk responden menebuskan saham-saham tersebut pada RM1 sesaham (termasuk premium), relief-relief lain yang dinyatakan secara alternatif tidak akan berbangkit kerana dengan penebusan tersebut pempetisyen dianggap sebagai telah melupuskan kesemua dari saham-sahamnya dalam responden. Oleh yang demikian, kepentingan dan hak pempetisyen dengan responden tamat.

[Rayuan dibenarkan.]

Legislation referred to:
Companies Act 1965, ss. 60, 61, 218(f), 365

For the appellant - CV Das (K Mohan); M/s Shook Lin & Bok
For the respondent - M David Morais (Anantha Krishnan); M/s M David Morais

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:
In this appeal, the appellant (the petitioner in the court below) filed an originating petition against the respondent seeking the following reliefs:

(i) That the Company be ordered to redeem the Preference Shares 'B' from the petitioners with no loss of value at RM2.5 million.

(ii) Further and/or alternatively the members of the Company purchase the Preference Shares 'B' from the Petitioners with no loss of value at RM2.5 million.

(iii) Further and/or alternatively the Company be wound up.

(iv) Further and/or alternatively:

(a) That the Company be ordered to pay a dividend of 95% per annum to the Petitioners from 24th December, 1992 that is from the date subscription monies was received by the Company.

(b) That the compensation of dividend to be mutually worked out between the Company and the Petitioners.

(c) That the Petitioners nominate a Director to the Board of the Company.

(d) That the Company convene an Extraordinary General Meeting within 30 days of this Order to carry the motion to incorporate the terms and conditions in relation to Preference Shares 'B' as contained in the letter dated 23rd June 1992 from the Company irrespective of whether a quorum and the majority of shareholders are present at the said Extraordinary General Meeting to carry the motion.

(e) That the resolution passed by the Extraordinary General Meeting on 28th April, 1992 pertaining to the new class of shares called Preference Shares 'D' and the class rights relating to it are rescinded and cancelled.

The learned judge in the court below dismissed the appellant's application. Being dissatisfied with that decision, the appellant appealed to this court. After hearing the submissions of the learned counsel of both parties, we allowed the appeal and made an order as prayed for in prayer (1) that the respondent do redeem the said Preference Shares 'B' held by the appellant at the par value of RM1 per share including premium that is to say with no loss of value at RM2.5 million. We now give our reasons for doing so.

For convenience we will refer to the parties as they were in the court below.

When Did The Petitioner Subscribe To The Preference Shares 'B'?

The present appeal commenced by way of originating petition and the trial in the court below was by way of affidavits. Both parties filed several affidavits to state their case and evidence. Facts which are not disputed are the petitioner on the invitation of the directors of the respondent subscribed to 2,500,000 non-cumulative Preference Shares of the respondent company (hereinafter referred to as "those shares"). The offer came pursuant to a Circular Resolution passed on 10 December 1991. The full text of the Circular Resolution is as follows:

Certified True Copy of the extract of the Resolution passed by Circulation on 10th December, 1991

RESOLVED that the Company do accept subscription to the Preference Shares 'B' in the Capital of the Company from Chloride Eastern Industries Ltd. for a total amount of RM2,500,000.00 (including the premium amount) subject to the terms and conditions as informed to the Board.

FURTHER RESOLVED that the Company is authorised to accept the subscription amount towards the said Preference Shares and allot the shares as soon as all the formalities are completed. However it is expressly resolved that the dividend will be payable pro-rata from the date the subscription money is received.

FURTHER RESOLVED that any one of Messrs. Y.B. Dato' K.R. Somasundram or H.R.K. Murthy Directors of the Company be and is hereby authorised to negotiate and finalise the terms and conditions with or without modifications as may be deemed necessary.

FURTHER RESOLVED that the meeting of the shareholders of the Company be convened to amend the Memorandum and Articles of Association of the Company to incorporate the modified terms and conditions in relation to Preference Shares 'B'.

Together with this Circular Resolution was a letter dated 10 December 1991 from one Dato' K.R. Somasundram, a director of the respondent, inviting the petitioner to subscribe to the Preference Shares 'B'. The relevant paragraphs are as follows:

We are in the process of raising additional capital in our Company and are pleased to enclose herewith the terms and conditions of our proposed Preference Shares Issue. We have pleasure in inviting your Company to subscribe to the said Preference Shares.

The dividend on the above shares would be free from Malaysian Tax as we would be able to frank dividend out of our tax exempt account. The effective return at the current tax of 37% would work out to 15.0% which would be an extremely attractive return on your investment. Further, barring unforeseen circumstances we intend listing of the equity shares of the Company in the Kuala Lumpur Stock Exchange during 1993 and this would mean that your investments would be liquid with considerable capital appreciation.

We are also enclosing herewith the projected profit and loss account and balance sheet of the Company for the next 5 years.

We request you to kindly go through the proposal and confirm your acceptance to enable us to go ahead with other formalities in the matter.

This letter obviously does not give a true reflection of the respondent because the application to get the respondent listed with the KLSE had been rejected as can be seen from the Directors' Report for the financial year ending 31 December 1991 (hereinafter referred to as the "financial year 1991"). Secondly, when this letter was prepared the writer should have known that the respondent had suffered losses in the financial year 1991. As shown in the accounts of the company for that financial year the respondent had suffered heavy losses and that the working capital of the company was in a very sorry state. The respondent needed the petitioner's subscription very urgently.

Because of the letter and the Circular Resolution the petitioner were attracted to invest with the respondent. As a result of that on 20 December 1991 the petitioner instructed their bank (The Hongkong & Shanghai Banking

Corporation in Singapore) to remit by way of telegraphic transfer the sum of RM2,500,000 to Pacific Bank Bhd, Wisma Hangsam, Jalan Hang Lekir, Kuala Lumpur for the credit of the respondent. There was no denial by the respondent that the sum was received by them before 30 December 1991. On the contrary the receipt was acknowledged in the Report and Account of the respondent for the financial year 1991 where in the Directors' Report it is stated that the petitioner has subscribed in 2.5 million of Convertible Redeemable Preference Shares 'B'. This is also reflected in the share capital of the respondent. It is of interest to note at paras. 3(b) and 3(c) of the Audited Report and Account of the respondent for the financial year 1991, the external auditors for the respondent have noted that Redeemable Preference Shares of RM0.10 each at the value of RM250,000 were issued and paid during the financial year 1991 and under the subheading Note 4(b) of the heading reserves under the items Shares Premium Account it is stated that the premium realised on the issue of Preference Shares 'B' was RM2,250,000.

The Preference Shares 'B' are special shares as provided for by art. 4B of the Memorandum and Articles of Association of the respondent where it provides:

> 4B. The Preference Shares 'B' shall have and enjoy the following rights and subject to the following restrictions:
>
> Dividend Rate : 95% per annum payable at the end of five months of close of the accounting year out of tax exempt profits.
>
> Redemption : In two equal instalments at the end of the fourth and fifth year from date of issue or earlier at the option of the Company by giving three months notice.
>
> Conversion :
> a. At the option of the subscriber, at any time before redemption of the shares by giving three months written notice to the Company, into ordinary shares of the Company.
>
> b. The conversion price into ordinary shares will be determined on the basis of the following formula:
>
> Average PE Ratio of Equity Shares for the immediate past two accounting periods multiplied by seven (7) shall be the price of each Equity Shares.
>
> Value of Preference Shares for the purpose of conversion shall be considered at MR1.00 per share.
>
> Other Conditions :
> a. In case no dividend is declared and/or paid for any accounting period from the date of issue, compensation in the rate of dividends for future period shall be worked out by mutual agreement.
>
> b. In case no dividend is declared and/or paid for any accounting period (inclusive of premium) from date of issue and/or the principal amount is not redeemed on due date the subscriber has the following rights:
>
> i. Voting right similarly enjoyed by holders of ordinary shares in the Company;

ii. Right to nominate a Director on the Board of the Company.

Miscellaneous : Other rights and obligations of the Company and the subscriber as are normal for such shares.

It was contended by the learned counsel for the petitioner that the petitioner have subscribed to those shares as soon as the money was received by the respondent and that those shares were allotted to them on the date when the money was received by the respondent in accordance with the Circular Resolution dated 10 December 1991. Respondent have confirmed the receipt of the money in the various notes of the report and account of the respondent for the financial year 1991. As such those shares are deemed to have been allotted to the petitioner before 31 December 1991.

On the other hand, it was contended by the respondent that they are not disputing the fact that the money was received by them before 31 December 1991, but those shares were only allotted to the petitioner in May 1992. In the meantime, the money paid was held in trust by the respondent. The reason being, according to the respondent, the pre-contractual negotiations in respect of the final terms and conditions as stated in the Circular Resolution have not been finalised.

It is clear to us that it was only the words of the respondent that those shares were not allotted to the petitioner before 31 December 1991. There is no evidence to support this. On the contrary, upon reading the Circular Resolution dated 10 December 1991 it is obvious to us that it was the intention of the parties that those shares be allotted to the petitioner as soon as the subscription was received by the respondent because of the wordings that "dividends be paid on prorata basis from the date the subscription money was received" as stated in para. 2 of the Circular Resolution. In our view the terms and conditions to be negotiated and finalised stated in para. 3 are in respect of other terms and conditions and nothing to the date of the allotment of the shares. This is clarified later when the parties agreed to the proposed amendments to art. 4B which were only confined to the redemption and conversion. Bearing in mind that the petitioner is buying all the Preference Shares 'B' there should be no question of allotment at all. It is clear to us from the report of the External Auditors' Report at paras. 3(b) and 3(c) which have been obtained from the respondent's books and records.

For those reasons we find that the allotment of those shares to the petitioner was made when the subscription money was received which was before 31 December 1991.

Dividends

The learned counsel for the petitioner submitted that since those shares were allotted to the petitioner in the financial year 1991, the petitioner were entitled to the dividend for that financial year. This was in accordance with the Circular Resolution dated 10 December 1991 where at para. 2 it is specifically expressed as follows:

> ... However it is expressly resolved that the dividend will be payable pro-rata from the date the subscription money is received.

It was not disputed that no dividend was declared for that year or the subsequent years until the financial year 1995 when a resolution was passed for dividend to be declared and paid. This was some two years after the petitioner have filed the present action. According to the petitioner it does not really matter whether dividend have been declared and/or paid for the financial year 1991. What is important is whether the petitioner were entitled to the dividend for that financial year because non-payment of the dividend would give the petitioner other rights as provided for by art. 4B of the Articles of Association of the respondent. The issue on those rights will be discussed later under different headings.

On the other hand, the learned counsel for the respondent submitted that the petitioner have no right to any dividend for the financial year 1991 basically on two grounds. The first, those shares were not allotted to the petitioner in that financial year. There is no dispute that the subscription was received in that financial year but the respondent have not allotted those shares in that financial year but only in May 1992. Since those shares have been allotted only in May 1992, no dividend was due to the petitioner in the financial year 1991. Secondly, it is not disputed that the respondent suffered losses for the financial year 1991 and as such dividend could not be declared for that financial year. To do so would be in contravention of s. 365 of the Companies Act 1965 which provides:

> 365. Dividends payable from profits only
>
> (1) No dividend shall be payable to the shareholders of any company except out of profits or pursuant to section 60.
>
> (2) Every director or manager of a company who wilfully pays or permits to be paid any dividend out of what he knows is not profits except pursuant to section 60:
>
> (a) shall without prejudice to any other liability be guilty of an offence against this Act; and
>
> (b) shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and that amount may be recovered by the creditors or the liquidator suing on behalf of the creditors.
>
> Penalty: Imprisonment for ten years or two hundred and forty thousand ringgit or both.
>
> (The rest of the provisions are not relevant.)

It was also submitted by the respondent that s. 60 of the Companies Act is not relevant because art. 4B specifically provides that the dividend be paid out of tax exempt profit.

As to the first, we have dealt with it earlier where we came to the conclusion that those shares have been allotted to the petitioner before 31 December 1991, ie, in the financial year 1991. Even assuming that those shares were not allotted to the petitioner in that financial year, it is clear to us that by virtue of the Circular Resolution dated 10 December 1991, the petitioner are entitled to the dividend for the financial year in which the money was received by the respondent, ie, the financial year 1991. It does not matter whether those shares were allotted or not because for all intents and purposes the petitioner have subscribed to all Preference Shares 'B' that were available. The wordings of the Circular Resolution are very clear that the petitioner are entitled to the dividend on prorata basis whether declared or otherwise. As to the second submission of the respondent that the declaration or payment would be in contravention of s. 365 of the Companies Act, it is clear to us that the petitioner are not asking for the payment of the dividend to be made but the notion that they are entitled to the dividend for the financial year 1991. Non declaration or non payment of the dividend for any financial year would confer certain rights to the petitioner as provided for by art. 4B of the Articles of Association. In our view, s. 365 of the Companies Act does not deprive the petitioner of their entitlement to dividend declared for the financial year 1991.

The conferment of rights when no dividend is declared or paid is provided for under the heading Other Conditions of art. 4B where it is provided as follows:

Other Conditions :

a. In case no dividend is declared and/or paid for any accounting period from the date of issue, compensation in the rate of dividends for future period shall be worked out by mutual agreement.

b. In case no dividend is declared and/or paid for any accounting period (inclusive of premium) from date of issue and/or the principal amount is not redeemed on due date the subscriber has the following rights:

   i. Voting right similarly enjoyed by holders of ordinary shares in the Company;

   ii. Right to nominate a Director on the Board of the Company.

It is the complaint of the petitioner that the non-recognition by the respondent of the petitioner's right to the dividend for the financial year 1991 have deprived the petitioner of several rights. One of them is the right to compensation. The parties did not come to mutual agreement in respect of compensation when the dividend for the financial year 1991 was not declared. There was no negotiation by the respondent because they took the stand that the petitioner was not entitled to the dividend for the financial year 1991.

We agree with the petitioner that non-recognition of the petitioner's entitlement to the dividend for the financial year 1991 by the respondent was an oppressive act by the respondent.

Voting Right

Another complaint by the petitioner was the refusal by the respondent to grant them any voting right. The petitioner claimed that they have the right to vote by virtue of art. 4B under the caption "Other Conditions (b)" (cited above). Under that provision when no dividend is declared and/or paid for any accounting period and at the same time those shares are not redeemed then the holders of those shares should be given the voting right similar to holders of ordinary shares. As we have stated earlier the petitioner's entitlement to dividend arose in the financial year 1991. No dividend had been declared in that financial year. It is clear that the respondent have not redeemed those shares until today. According to art. 4B the petitioner should be given the voting right in the accounting year 1992 until those shares are redeemed. The petitioner wrote several letters to the respondent requesting that they be given the right to attend and vote at general meetings held in 1992 and subsequent years. The respondent through Mr. Agarwal replied that the petitioner's representative could attend all the meetings but would have no voting right. In other words he could attend those meetings as an observer only.

It is clear to us from the record that there were several matters discussed at those meetings where the petitioner's rights have been affected and it was important for the petitioner to speak at those meetings and vote. One of them was in respect of the resolution by the respondent to invite the holders of ordinary shares to subscribe to Preference Shares 'D' which rank *pari passu* with those shares. As can be seen from the record the resolution in respect of Preference Shares 'D' was passed after the petitioner have paid the full subscription sum. The total number of Preference Shares 'D' subscribed by the ordinary shareholders of the respondent were 22,869,280. This is much bigger than those shares held by the petitioner. Since Preference Shares 'D' rank *pari passu* with those shares, the rights of the petitioner have been adversely affected especially the dividends. According to the record the respondent apparently allotted the Preference Shares 'D' earlier than the date the 'respondent claimed to have allotted those shares to the petitioner. The petitioner did express their concern about this but of no avail. Apparently when that meeting inviting subscribers to Preference Shares 'D' was held, the petitioner were told that they were not allowed to attend and to vote on the ground that they have not been allotted those shares.

Another grievance of the petitioner when no voting right was given was the meeting held on 28 April 1995 when the proposed amendments to art. 4B as agreed by the parties were tabled. The proposed amendments are:

Redemption : In two equal instalments at MR1.00 per share (including premium of M$0.90 per share) at the end of the fourth and fifth year from the date of issue or earlier at the option of the Company by giving (3) three months notice.

Conversion : a. Same as the existing.

b. The conversion price into ordinary shares will be determined on the basis of the following formula:

Average earning per share of equity shares for the immediate past two accounting periods multiplied by PE Ratio of seven subject to a minimum conversion price of M$1.00 per share. The earning per share on equity shares will be calculated as under:

Earning per Share (EPS) – Net Operating Profit Before Tax Less Dividend On All The Preference Shares / Total No. Of Issued Equity Shares

Value of these Preference Shares for the purpose of conversion shall be considered at M$1.00 per share.

It is interesting to note that the respondent through Mr. Agarwal have promised to table the proposed amendments on several occasions earlier, the first being the meeting held on 28 August 1992, but they were never tabled until the meeting held on 28 April 1995 and even then the amendments tabled were the abridged version where the caption "Conversion" was deleted. It is also interesting to note that Mr. Agarwal in no uncertain term told the petitioner that the petitioner could attend the meeting but with no voting right. In other words the petitioner could not move the proposed amendments even though their rights would be affected. For that reason the petitioner did not attend the meeting held on 28 April 1995. Another reason given by the petitioner for not attending the meeting on 28 April 1995 is that they have by then commenced the present proceedings.

As expected, the proposed amendments were never carried out at the meeting on 28 April 1995. The proposed amendments were doomed from the very beginning since there was no one to propose them at that meeting. This could be seen from the excerpts of the minutes of that meeting:

6. The Chairman placed before the members the following resolution for their consideration as special business and special resolution.

RESOLVED THAT Articles of Association of the Company be amended by deleting the whole of sub-paragraph of Article 4B captioned "Redemption" and by replacing the deleted sub-paragraph with the following:

Redemption : In two equal instalments at MR1.00 per share (including premium of MR0.90 per share) at the end of the fourth and fifth year from the date of issue or earlier at the option of the Company by giving (3) three months notice.

The Chairman invited that anyone member do propose the aforesaid resolution. No member came forward to propose the same. The Chairman then put the resolution to vote by show of hands.

No. of persons in favour - Nil

No. of persons against - 4

From the above, we observe that it was never the intention of the respondent to amend art. 4B. Mr. Agarwal, who is the person who informed the petitioner that the respondent have agreed to the proposed amendments was at the meeting held on 28 April 1995 but did not propose those amendments. It is clear that the shareholders of the respondent refused to confer better rights to the petitioner other than those given under art. 4B despite the assurances given by Dato' K.R. Somasundram in his letter and the Circular Resolution. The proposed amendments were to remove any ambiguity which might arise in respect of redemption so that the respondent would not be relieved of their obligations to redeem those shares at their full aggregate value. Instead, at that meeting, the respondent passed a resolution to redeem those shares from the petitioner at the value to be determined by the Board of Directors.

It is clear to us from the above that the petitioner have been adversely affected when the respondent refused to accord them any voting right. Again we find that the respondent have been oppressive of the petitioner.

Appointment Of Petitioner's Representative As Director

Article 4B of the Articles of Association confers another right to the petitioner when no dividend is declared or payable. Under the caption of Other Conditions (b)(ii) it is provided as follows:

> b. In case no dividend is declared and/or paid for any accounting period (inclusive of premium) from date of issue and/or the principal amount is not redeemed on due date the subscriber has the following rights:
>
> ...
>
> ii. Right to nominate a Director on the Board of the Company.

The right to nominate a director to the board of directors of the company as can be seen from the above provision arises from the non-declaration of dividend. As we have said earlier the petitioner should be entitled to the dividend from the financial year 1991. Since no dividend had been declared in the financial year 1991 the petitioner was entitled to nominate their representative to the board of directors of the respondent. It is obvious to us that there was no proposal to amend that provision. It is also not disputed that those shares have not been redeemed. As such in accordance with that provision the petitioner should have been allowed to appoint its representative as a director of the respondent in the accounting year 1992. Despite the query raised by the petitioner the respondent refused to allow such appointment on the ground that the petitioner was entitled to any dividend from the financial year 1991 until the commencement of this proceeding.

In refusing to nominate a representative of the petitioner to be a director it is clear to us that the existing directors of the respondent wanted to dominate the board of directors to the total exclusion of others including the petitioner despite clear wordings of art. 4B. Again in this respect we find that the respondent have oppressed the petitioner.

Redemption And Conversion

It is clear from the existing art. 4B there are provisions in respect of redemption and conversion which read:

> 4B. The Preference Shares 'B' shall have and enjoy the following rights and subject to the following restrictions:
>
> ...
>
> Redemption : In two equal instalments at the end of the fourth and fifth year from date of issue or earlier at the option of the Company by giving three months notice.
>
> Conversion : a. At the option of the subscriber, at any time before redemption of the shares by giving three months written notice to the Company, into ordinary shares of the Company.
>
> b. The conversion price into ordinary shares will be determined on the basis of the following formula:
>
> Average PE Ratio of Equity Shares for the immediate past two accounting periods multiplied by seven (7) shall be the price of each Equity Shares.
>
> Value of Preference Shares for the purpose of conversion shall be considered at MR1.00 per share.

It is clear to us under the existing art. 4B, the respondent have the right to redeem those shares in the fourth and fifth year in two equal instalments or earlier by giving three months notice. In our view the redemption should be equal the value of those shares at the time when the petitioner subscribed to them, ie, the total amount paid by the petitioner including the premium paid. In order to prevent any ambiguity as to the value of the redemption both parties agreed to amend the redemption clause whereby the value is clearly stated. The full text of the proposed amendments according to the letter dated 23 June 1992 written by Mr. Agarwal on behalf of the respondent and confirmed by the petitioner read:

> 6. **Redemption**
> In two equal instalments at MR1.00 per share (including premium of MR0.90 per share) at the end of the fourth and fifth year from the date of issue or earlier at the option of the Company by giving (3) three months notice.
>
> 7. **Conversion**
> a. Same.
>
> b. The conversion price into ordinary shares will be determined on the basis of the following formula:
>
> Average earning per share of equity shares for the immediate past two accounting periods multiplied by PE Ratio of seven subject to a minimum conversion price of MR1.00 per share. The earning per share on equity shares will be calculated as under:

Earning Per Share (EPS)	–	Net Operating Profit Before Tax Less Dividend On All The Preference Shares
		Total No. Of Issued Equity Shares

Value of these Preference shares for the purpose of conversion shall be considered at MR1.00 per share.

At the meeting held on 28 April 1995, as can be seen from the minute, the Chairman invited the members to move the proposed amendments only in respect of the redemption and not the conversion. Due to the reasons we have stated earlier, the petitioner did not attend the said meeting. As a result no one moved the proposed amendments. On the other hand, the meeting held on 28 April 1995 passed a resolution as follows:

> 7. The Chairman placed before the members the following resolutions for their consideration as special business but ordinary resolution.
>
> i) RESOLVED THAT the Company redeems all of the issued Preference Shares 'B' at an appropriate redemption consideration to be determined by the Board of Directors and that the appropriate notice of redemption be given to the holders of Preference Shares 'B'.
>
> ii) RESOLVED THAT the Company grants the holders of Preference Shares 'B' the option to convert their Preference Shares 'B' to ordinary shares pursuant to Article 4B of the Articles of Association and that the option to convert may be exercised at any time during the validity of the notice to redeem the Preference Shares 'B'.
>
> On invitation by the Chairman En. Ab. Rahim bin Mohd Zain proposed the aforesaid resolutions which were then seconded by En. Abdul Aziz bin Mohamed Hussain. On having been put to vote the resolutions were carried unanimously.

Considering what happened above, it is obvious to us that it was never the intention of the respondent to confer any right or status to the petitioner when Dato' K.R. Somasundram invited the petitioner to subscribe to those shares. As we see it, the purpose of the invitation was nothing more than to bail the respondent at the time of difficulties. For that purpose Dato' K.R. Somasundram by his letter and the Circular Resolution dated 10 December 1991 painted a rosy picture of the respondent and made several attractive offers which we have stated earlier, one of which is that the petitioner is guaranteed the full return of their investment in the fourth and fifth year by way of redemption of those shares to the full value of the subscribed sum including the premium. For that reason, there was an agreement between the parties to amend the redemption clause to art. 4B to ensure the full return of the investment by the petitioner. From the evidence, it is clear to us that the parties have agreed to the proposed amendments which were to be tabled at the meeting held in August 1992. From the record, it is clear to us that the

respondent went back on their words and did not table the amendments at that meeting and subsequent meetings until the meeting held on 28 April 1995. The agreed pact between the parties were totally destroyed when the amendments were not moved on 28 April 1995 and the resolution passed by the shareholders as to the redemption and the decision of the board of directors in respect of the redemption value. This was conveyed to the petitioner by the respondent's company secretary through the letter dated 11 May 1995 where, *inter alia*, it states:

(i) The amendments to Article 4B was not passed.

(ii) That the respondents redeemed Preference Shares 'B' from the petitioners. The Board of Directors subsequent to the AGM decided the redeemed price to be RM0.10 per share.

(iii) That the petitioners retain the option to convert their Preference Shares to ordinary shares. The option remained until 11.8.1995.

This letter was followed by another letter dated 12 June 1995 informing the petitioner that the date of option have been extended to 20 August 1995.

The solicitors for the petitioner responded by requesting for a copy of the minute of the meeting held on 28 April 1995. The solicitors for the respondent obliged by a letter dated 7 July 1995 and urged the petitioner to accept the offer to convert. On 11 July 1995 the solicitors for the petitioner wrote back protesting against the resolution and the decision of the board of directors to redeem those shares at RM0.10 per share since it is one of the issues raised in the present action. By then, it is obvious to us that the petitioner was not interested in conversion taking into consideration what have happened. From what had transpired in the present action it is also obvious to us that the petitioner was only interested to get the full sum subscribed by them for those shares and that is by way of redemption.

It is clear to us that the resolution in respect of redemption passed by the shareholders at the meeting held on 28 April 1995 does not have the effect of amending art. 4B, certainly not the decision of the board of directors as to the value of the redemption. As far as we are concerned, the redemption as stated in art. 4B is still effective. Any redemption to be done must be in accordance with the said art. 4B unless it has been amended. Reading the redemption clause of art. 4B, in our opinion, the redemption should be the full aggregate value subscribed (including premium paid) in two equal instalments in the fourth and fifth year after the subscription. The respondent could redeem those shares earlier by giving notice if they have the means to do so. Sections 60 and 61 of the Companies Act 1965, in our opinion, prohibits the redemption of preference shares at lesser value than the aggregate amount subscribed. These provisions of the Companies Act could not be modified by resolution passed. In our view, the aggregate amount subscribed in s. 61 of the Companies Act means the sum subscribed for the preference shares and

the premium paid which in this case is RM1 per share. As such the offer by the respondent to redeem those shares at RM0.10 per share is contrary to s. 61 of the Companies Act.

It is clear, in our view, that by offering to redeem those shares at RM0.10 per share the respondent had acted oppressively against the petitioner.

Conclusion

From the above, we are of the view that the petitioner have made up a case under s. 218(f) of the Companies Act that the directors of the respondent have been unfair and unjust to the petitioner which entitled the respondent to be wound up. It is clear to us that winding-up is not in the interest of the parties although this petition was filed under that section. It is clear to us, from the statement of claim and the reliefs sought, the petitioner was more interested in getting back the full sum they have paid in order to subscribe to those shares as seen in prayer (1).

The petitioner in their statement of claim seek several reliefs and we have noted that those reliefs are in the alternatives. The main relief sought by the petitioner is for the respondent to redeem those shares at the full aggregate value of RM1 per share (including the premium). In our view, if this relief is granted then the other reliefs stated in the statement of claim will not arise because by the redemption the petitioner was deemed to have disposed of all their shares in the company. As such the petitioner's interests and rights with the company ceased.

For the above reasons, we are unanimous in allowing the present appeal with costs here and below. The order of the learned judge is hereby set aside. We make the order that the respondent do redeem the Preference Shares 'B' from the petitioner at the par value of RM1 per share (including the premium) and that the respondent do pay the petitioner the RM2.5 million within three (3) months from the date hereof and the interests at 8% on the RM2.5 million from December 1996 to the date of payment and on the sum of RM1.25 million for the years of December 1995 and 1996. The deposit is to be refunded to the petitioner.